United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1206

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- WILLIE WILLIAMS, Appellant.	Docket No. 75-1206

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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I

The Government concedes that the testimony concerning appellant's silence was erroneously admitted into evidence, but argues that it was harmless error to admit such evidence.

The Government finds much in counsel's failure to object. That failure, of itself, is not significant. Since the purpose of an objection is to enable the court to correct an error by striking the testimony or giving a curative instruc-

tion (United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965), cert. denied, 383 U.S. 907 (1966)), the reason for requiring such an objection is absent here. The Judge gave such a curative instruction, but, as in Hale, under the circumstances described below, that curative instruction could not have been effective. Hale v. United States, 43 U.S.L.W. 4806, 4807 n.3 (Sup. Ct., June 23, 1975).

Further, the failure to object is not symptomatic of a defense strategy. The introduction of appellant's silence came in as part of the Government's direct case, in accord with the District Judge's instructions that a proper foundation be laid for the introduction of appellant's statement. In fact the Judge himself participated in the questioning of the witness (181) up to the point at which the inquiry went to appellant's silence (182).

Once this testimony was before the jury and had the effect of showing that appellant's statement must have been a recent fabrication and thus was a false exculpatory statement, counsel was charged with the responsibility of arguing the evidence on the record as he found it. Harrison v. United States, 392 U.S. 219 (1968); United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975); United States ex rel. Lopez v. Zelker, 72 Civ. 1117 (S.D.N.Y., May 12, 1972), affirmed in open court, Doc. No. 72-1690 (2d Cir., August 17, 1972); United States ex rel. O'Connor v. New Jersey, 405 F.2d 632, 638 n.20 (3d Cir.), cert. denied sub nom. Yeager v. O'Connor, 395 U.S.

923 (1969). This course of action was not defense counsel's strategy, but was compelled by the action of the Government in introducing appellant's silence in its case in chief.

Since the effect of the evidence of silence was to demonstrate for the jury the falsity of his reason for being in the bank, the prejudice which accrued was great. Indeed it was the strategy of the Government to use the admission of presence in the bank as being true, and therefore evidence of guilt, and the statement as to the reason for appellant's presence in the bank as false and likewise evidence of guilt:

> ... The second statement made upon reality of the position that he is in, put him in the bank. Clearly such an admission by the defendant himself is among the strongest evidence [to] come from the defendant himself. The defendant went into the bank for change of a dollar is of course preposterous. Ask yourself if that makes sense. Do you wait on line six persons deep to arrive at a teller window and ask for change and then not give the teller anything to change? Would you give her a note asking for change and if you did, would the note say "You are covered, pass the money." This story is incredible. And while the throught suggests itself, realize that a reasonable doubt, ladies and gentlemen, is doubt based on reason. It is not based on some plausible story. It is not based on whim or caprice. The defendant's story is just not plausible.
>
> (253-254).

Indeed, the judge instructed the jurors on how they were to consider false exculpatory statements:

> In any event, those are in the nature of exculpatory statements. If you believe they are false, then you may determine that

> the defendant has consciousness of guilt and he knows that he did something wrong and that he is using this statement to exonerate himself and possibly get off. That is a judgment for you to make, and you do that in evaluating the evidence.
>
> (279-280).

Since it was proper for appellant to remain silent, it was improper to use that silence to show his statement was false and that he therefore had a consciousness of guilt. The Government's position that there was no such claim (Br. at 10) is simply not properly drawn from this record.

II

The Government asserts that the District Judge properly refused to hold a hearing on the voluntariness of appellant's statement because the motion was untimely. However, the Government did not assert untimeliness as a basis for denial of the motion below, and the failure to present this argument denied defense counsel the opportunity to explain the reasons for his failure to make this motion prior to trial.*

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*If presented to the court, it is submitted that the record would have shown that, prior to trial, defense counsel availed himself of the informal discovery procedures established between The Legal Aid Society, Federal Defender Services Unit, and the United States Attorney's office. That information did not reveal that any statement had been made by appellant. After the pre-trial Simmons hearing counsel received 3500-material. Properly assumint that it contained no previously undisclosed discovery material, counsel did not read that material until the witness was called.

The Government also argues that appellant was not entitled to a hearing because there was no threshold showing of involuntariness by the defense. However, the facts that appellant initially chose to remain silent, refused to sign the waiver of rights form, and then changed his mind and decided to make a statement in themselves raise the question of why he changed his mind. Indeed, a change of mind and a refusal to sign the form, while not conclusive of coercion, are factors to be considered on that issue.

When Judge Cannella denied the motion, he did so on the Government's offer of proof without giving the defense any opportunity to cross-examine the Government witnesses. Defense counsel should have been allowed to explore the implications of appellant's silence and change of mind as it related to the question of voluntariness in a proceeding outside the presence of the jury. Such a proceeding would have permitted the court to consider silence on the single issue for which it was relevant -- voluntariness.

CONCLUSION

For the above-stated reasons and the reasons set forth in the main brief for appellant, the judgment must be reversed and the case remanded for a new trial.

Respectfully submitted,

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Certificate of Service

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I certify that a copy of this reply brief has been mailed to the United States Attorney for the Southern District of New York.

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